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The Civilian and the War Power

Henry J. Fletcher

THE CIVILIAN AND THE WAR POWER

THE war is raising many constitutional problems of the most far reaching importance, all of which may perhaps be grouped under the single question: What is the reach of the war power? The purpose of this paper is by no means so ambitious as to attempt an answer to that question: it is rather to inquire into the nature of the war power with respect to the rights of civilians, and specifically with respect to the jurisdiction of military tribunals over persons not members of the military or naval service.

The war power in the United States rests upon as secure a constitutional foundation as any other of the great powers of sovereignty. The express grants are too familiar to need quoting.[1] But over and beyond these specific grants rises the towering fact that the United States is a nation; that under the constitution a sovereign state has arisen endowed—at least so far as the war-power is concerned—with all the inherent powers of national sovereignty not withheld by the constitution. Mr. Justice Strong, writing the opinion of the Supreme Court and speaking of the early amendments to the constitution restricting the powers of the government,[2] says:

"They tend plainly to show that in the judgment of those who adopted the constitution there were powers created by it neither expressly specified nor deducible from any one specified power or ancillary to it alone, which grew out of the aggregate of power conferred upon the government or out of the sovereignty instituted."

And Mr. Justice Bradley in the same case declares boldly that "The United States is not only a government, but it is a

[1] Const. U. S., Art. I, Sec. 8, pars. 11, 12, 13, 14, 15, 16, 18; Sec. 10, pars. 1, 3.

[2] Legal Tender Cases, (1870) 12 Wall, 535, 20 L. Ed. 287. See also opinion of Gray, J., in Juilliard v. Greenman, (1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122.

This theory of "inherent powers of sovereignty" as a test of the powers of the National Government, is vigorously opposed by Justice Brewer in Kansas v. Colorado, (1907) 206 U. S. 46, 51 L. Ed. 956, 27 S. C. R. 655, and is regarded by Professor Willoughby as not only "constitutionally unsound," but as "revolutionary." Willoughby, Constitutional Law, II, Sec. 38. But when properly understood, and con-

national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, negotiations and intercourse with other nations; all of which are forbidden to the state governments." And he draws the conclusion that the government "is invested with all those inherent and implied powers which at the time of adopting the constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions." He declares that it is absolutely essential to the independent national existence that the government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril.

It is of course true that the war power comes into play only in time of war; in peace it is latent; but when the time arrives for its exercise, whatever is within the scope of the war power is as much authorized by the constitution as any other of the great governmental functions. It is a mere fallacy to say that inter arma leges silent means military dictatorship. If, in the exercise of the war power, individual rights which clash with it are suspended, such suspension is authorized by the constitution and is not a violation of it.

Light may be thrown upon the relation of the war power to the constitution by considering the relation of the constitution to the treaty-making power. This power like the war power is expressly granted; and the treaties made "under the

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fined within proper limits, it does not seem to the author inconsistent with the fundamental conception of the federal government as one of enumerated powers. In its international relations—and certainly war is one of these—the government of the Union is national. Professor Willoughby recognizes this: "Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced corresponding federal powers. In Fong Yue Ting v. United States, [149 U. S. 696, 13 S. C. R. 1016, 37 L. Ed. 905] that Court says: 'The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective.' " Likewise, the power of eminent domain, nowhere expressly granted, must be conceded to the federal government as a necessary incident of sovereignty. "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law." Strong, J., in Kohl v. United States, (1875) 91 U. S. 367, 23 L. Ed. 449.

authority of the United States" are declared to be part of the supreme law of the land; but when we look for some definition of the scope of the treaty-making power it is to be found only in the inherent nature of sovereignty. Every war ends in a treaty, and the fruits of the war, whether of victory or disaster, are expressed in the treaty of peace. Hence the two powers are inextricably blended together as the supreme expressions of the national sovereignty. No constitution, in the last analysis, can limit either the one or the other, because the right and the duty of the government to protect the life of the state must of necessity be paramount over all other rights and duties. For the purposes of this discussion it is not necessary, however, to carry the point to that extent; it is only necessary to assert that the United States possesses the war power and the treaty-making power in as full and perfect a degree as any other sovereign state except in so far as it is limited by the terms of the constitution itself. The states are expressly excluded from both fields. Either the war power in its entirety is vested in the government of the United States, or so far as not vested cannot be exercised at all, and the United States, unlike other sovereign states, is obliged to fight with its hands tied.

With respect to the treaty-making power the Supreme Court has said:[3]

"The treaty-making power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

But if the treaty-making power embraces the right to acquire territory by purchase or as the result of a successful war (as was said by Bradley, J., in *Mormon Church v. United*

[3] Geofroy v. Riggs, (1890) 133 U. S. 258, 33 L. Ed. 642, 10 S. C. R. 295.

States[4]), it cannot be doubted that it extends to the cession of territory in case of defeat in war; and it is difficult to resist the conclusion that the president and senate might by treaty transfer any of the outlying dependencies to a foreign country even in time of peace. This latter power has indeed been expressly conferred upon congress by the constitution,[5] but there is no reason to think that the treaty-making power is incompetent to do so when the terms of the treaty are dictated by a victorious enemy.

The line of cleavage between state and federal power is totally ignored in the exercise of the treaty-making power, as Mr. Root has conclusively shown:[6]

"The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state. . . . It is of course conceivable that under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question."

When state laws excluding aliens from the ownership of land, alien children from the enjoyment of school privileges, alien laborers from working in factories, are overridden and nullified by a treaty (as they may be) the constitution is not violated. When in the exercise of the war power civilians are prevented from enjoying rights indisputably theirs in time of peace but which interfere with the successful prosecution of the war, can it be said that their rights are unconstitutionally invaded?

To state the question shortly: Is congress, in the exercise of the war power, limited by the Bill of Rights? Or, let us subdivide the question, and inquire specifically:

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[4] Mormon Church v. United States, (1890) 136 U. S. 1, (42), 34 L. Ed. 481, 10 S. C. R. 792.

[5] Art. IV, Sec. 2.

[6] Address before the American Society of International Law, April 19, 1907, 1 Am. J. Int. Law, 273, 278.

(1) May Congress try by court-martial, without a jury, and punish any person not in the military or naval service for an act prejudicial to the conduct of the war?

(2) May Congress abridge the freedom of speech or of the press where it hampers the exercise of the war power by discouraging enlistment, or weakens the morale of the armies by maligning the military chiefs?

(3) May Congress fix the prices of commodities and services, compel the sale of goods and the performance of services in war time in ways which in peace time would be a deprival of liberty and property without due process?

(4) May Congress by law compel civilians to labor on ships or railroads in transporting troops and munitions? This question perhaps is not fairly embraced within the general problem under discussion, as it may be claimed that such persons, when their labor is commandeered for the transportation of troops or military supplies, are in the military service as much as soldiers.

A somewhat similar question seems to have been raised by the conviction before a court-martial of Charles E. Gerlach,[7] second officer of an army transport, for refusing to serve as a lookout for submarines and torpedoes while his ship was in the European danger zone. Gerlach was sentenced to five years at hard labor in army disciplinary barracks, in spite of his claim that his constitutional rights were violated in that he was a civilian and therefore not amenable to court-martial. He claimed that though a civilian officer in the transport service, he was returning to the United States merely as a passenger. The government contended that he was still amenable to orders, although he was not on the ship to which he was regularly detailed.

Doubtless all these questions may be considered as embraced within the first, since if Congress has the power, as a war measure, to provide for the trial of a civilian before a military tribunal, without presentment by a grand jury or trial by a petit jury, and may authorize such a tribunal to order him hanged or shot, all the other guaranties of the constitution must be regarded as intended for a time of peace only, and as in abeyance during war. It is of course, predicated,

[7] See New York Times, Nov. 24, 1917.

that the act for which the civilian in question is tried and punished is committed in a place where no actual fighting with the enemy is going on, and where the courts are open and performing their usual functions, for otherwise the question is not debatable; it must also be assumed that it is in a place where military preparations are being made, such as the enlistment, training, or transportation of troops, or the manufacture, storage, or transportation of military supplies; but it would be difficult to find any place in the United States at the present time in which some or all of these things are not being done.

The question is precisely that which confronted the Supreme Court of the United States in the celebrated *Milligan Case*.[8] Milligan, an American citizen, not a member of the army or navy, nor in any way connected with the service, was seized in 1864 in his home in Indiana by order of the military commandant of the district of Indiana, confined in a military prison at Indianapolis, tried by a military commission convened by General Hovey's order and condemned to death by hanging. The charges were conspiracy against the government of the United States, affording aid and comfort to the rebels, inciting insurrection, disloyal practices, and violation of the laws of war. The sentence was approved by the President and on the point of being carried into effect when he was discharged upon habeas corpus by the Supreme Court of the United States. All of the justices agreed that he was entitled to be discharged because the act of Congress required that military prisoners other than prisoners of war, citizens of states in which the administration of the laws had continued unimpaired in the federal courts, should be entitled to their discharge if they were not indicted within twenty days after their arrest. The federal courts had been in the undisturbed performance of their functions in Indiana, and Milligan had not been indicted within the time named. Technically his right to discharge was clear. But the court went further, and declared—unnecessarily so far as Milligan was concerned—that the military tribunals organized during the civil war, in states not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense a citizen who was neither a

[8] Ex parte Milligan, (1866) 4 Wall. 2, 18 L. Ed. 281.

resident of a rebellious state nor a prisoner of war nor a person in the military or naval service; and that Congress could not invest them with any such power. The Court declared that "martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."

Four of the justices dissented, among them Chief Justice Chase, declaring that Congress had the power though not exercised to authorize military commissions. Both sides regarded the question as of momentous importance for the future. To the majority the concession of such a power to the military would one day mean the overthrow of constitutional freedom; to the minority, its denial meant the paralysis of the military authority in the hour of public danger. The case was decided in 1866, after the exigency of the war had passed away. It is likely to come up again before the same court, now that a war of vastly greater magnitude is upon us.

If it be true that the acts of military officers in making the arrest of such a person and of the military commission in trying him and in carrying the sentence into effect, are all null and void, the approval of those acts by the president is of no avail to protect the officers; and if as seems probable, even statutes of indemnification by Congress are unconstitutional, it is easy to see how loath army officers are likely to be to act with vigor and promptitude in districts where there is no actual invasion but where wrecks, fires and explosions are paralyzing military preparations and an insidious propaganda is poisoning the springs of national patriotism.

The essence of the question seems to be this: admitting that in any possible case Congress may declare martial law, is the right founded upon the constitution or upon necessity? If the former, it is a mere exercise of the war power and Congress is the sole judge of the imminence of the danger; it is a political and not a judicial question; the power existing, the courts cannot inquire whether the facts justify its exercise either in the actual theater of war or in places remote from the field of action. If it rests upon necessity alone, and not upon the constitution, it is a judicial question, and every soldier when held to answer after the war for his conduct must be prepared to justify himself before a jury, not by the command

of his military superiors nor by the act of Congress, but solely by the necessity which alone gave his act validity. In the *Milligan Case* the majority of the judges took the latter position, the minority the former.

It is asserted that the war power is subject to certain constitutional limitations. The fundamental rights of the citizen as against the exercise of arbitrary power are secured to him by the clauses of the constitution guaranteeing to him freedom of speech and of the press, freedom of assembly for the purpose of petition, trial by jury, immunity from unreasonable searches and seizures and from prosecution for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. In general, he is not to be deprived of life, liberty, or property without due process of law. It is said that all of these guaranties are swept away if a citizen who is not a member of the military or naval service can be tried before a military tribunal unknown to the judicial system of the country, and condemned and executed under the authority of the President. The authority to set aside these express provisions of the constitution must be found if at all in the war power, and in that particular exercise of the war power known as martial law.

Martial law must be distinguished from (a) military law and (b) military government. The former is that body of specific rules governing the army and navy, as a separate community, which may be described as the military state. It applies both at home and abroad, in peace and in war. It is partly written and partly unwritten. Its written part is composed of the statutory code or Articles of War, other statutory enactments relating to the discipline of the army, the army regulations, and general and special orders.[9] Persons entering

[9] Winthrop, Military Law and Precedents, II, 2nd ed., p. 1, 4.
"Military law is as clearly defined as any system of statute, common, or civil law. It consists of the Articles of War enacted by Congress, the regulations and instructions sanctioned by the President, orders of commanding officers, and certain usages and customs constituting the unwritten or common law of the army." Ex parte Bright, (1874) 1 Utah 145. The persons subject to military law are not merely the officers and soldiers of the army, and the militia when called into active service, but may include civilian employees serving with the army, in the Indian country, during offensive operations against the Indians. 14 Op. Atty. Gen. 22, (1872). A clerk in the employ of a paymaster in the army. In re Thomas, (U. S. C. C. 1869) Fed. Cases

the military state subject themselves to this jurisdiction and no longer are entitled to the protection, in respect of criminal procedure, which the constitution guarantees to civilians. The tribunals by which this law is enforced are not a part of the judicial system, and their judgments are not subject to review under certiorari or habeas corpus by the Supreme Court.[10] It is not arbitrary in character but is as definite and precise as the body of law governing civilians. It does not supersede the civil laws in the sense of exempting the soldier from liability to trial and punishment in the ordinary courts the same as civilians. Military government is "that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof.[11] In his dissenting opinion in *Ex parte Milligan,* Chief Justice Chase described it as "military jurisdiction to be exercised by the military commander under the direction of the President, in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents." In the exercise of military government, the commander may adopt, for the purposes of temporary civil administration, the existing system of the country, including its laws and courts, but the jurisdiction of such laws and courts is not ex proprio vigore, but solely by virtue of the authority conferred by him. It is therefore the arbitrary will of the commander; it may be suspended, modified, or superseded at his discretion. Military government is a species of civil government existing under the sanction of the war power in the enemy's country—foreign, if the war be foreign, in occupied rebellious territories if it be a civil war.

No. 13, 888. The Articles of War, adopted Aug. 29, 1916, C. 418, Sec. 3, declares that among the persons subject to military law are: "d. All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these Articles." 4 U. S. Compiled Stat. Annotated, Sec. 2308a, p. 3950. It is of course true, as a general rule, that a citizen of the United States, not in the military service, is not amenable to a court-martial, because he is not subject to the Articles of War. Smith v. Shaw, (1815) 12 Johns. (N. Y.) 257; Ex parte Merryman, (1861) Taney (U. S. C. C.) 246, Fed Cas. No. 9487, Taney, C. J.; In re Kemp, (1863) 16 Wis. 359.

[10] Ex parte Vallandigham, (1863) 1 Wall. 243, 17 L. Ed. 589.

[11] Winthrop, II, 1245.

Martial law, on the other hand, is a jurisdiction exercised over civilians, at home, within a territory not rebellious, not occupied by the army. It does not apply to the army nor to enemies. It is established not by military occupation, but by proclamation. It is accompanied either by an express or tacit suspension of the writ of habeas corpus, since its exercise cannot tolerate the supervision of the regular courts.

The distinction between military law and martial law has often been confused. Blackstone seems to confuse it. He says:[12]

"Martial law, which is built on no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observed, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land."

But martial law, as at present understood, has nothing to do with the order and discipline in an army; it is more nearly an application of military government to persons and property at home, in time of war and within the theater of war, or so near to it that the unrestricted operation of the ordinary municipal laws would impair the efficiency of the exercise of the war power. The commander, in this discussion, must be understood to be the President, acting of course under the authority of Congress, in whom the war power is constitutionally vested.

"Martial law," says Professor Dicey,[13] "in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France 'declaration of a state of siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army." In the sense that every subject, whether a civilian or a soldier, policeman or private citizen, has the right and owes the duty to assist in putting down breaches of the peace, repelling invasion, quelling riots, and

[12] Blackstone, Comm., I, *413. For discussion of distinction between martial law and military law, see 1 Cooley's Blackstone, *413, note.

[13] Dicey, The Law of the Constitution, 4th ed., p. 268.

restoring the supremacy of law, this right and duty is recognized by the common law.[14] But considered as a part of the common law, every officer, soldier, policeman, and civilian is liable to be held accountable for any unnecessary or excessive use of force, before the civil courts.[15] Dicey[16] well observes that "the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment the riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution."

After the decision of the Supreme Court in the *Milligan Case,* General Hovey was sued by Milligan. The court held that he was liable, but the jury considering all the circumstances, gave only nominal damages.[17]

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[14] Dicey, p. 269.

[15] Rex v. Pinney, (1832) 5 C. & P. 254, 3 St. Tr. (N. S.) 11.

[16] Dicey, p. 271.

[17] Milligan v. Hovey, (1871) 3 Biss. (U. S. C. C.) 13, Fed. Cas. 9605. See also, Griffin v. Wilcox, (1863) 21 Ind. 372, 386, in which the Indiana court holds unconstitutional the Act of Congress, passed in 1863, exempting any officer from civil or criminal liability for any act done under the order of the President or by his authority. Major Lyon, at Indianapolis, in 1863, by military order prohibited the sale of liquor to soldiers. Plaintiff was arrested by defendant for violating the order. The court says: "The war power of the President, then, may be stated thus: He has a right to govern through his military officers by martial law when and where the civil power of the United States is suspended by force. In all other times and places the civil excludes the martial law—excludes government by the war power. Where force prevails martial law may be exercised. But in all parts of the country where the courts are open, and the civil power is not expelled by force, the constitution and laws rule, the President is but the President, and no citizen, not connected with the army, can be punished by the military power of the United States, nor is he amenable to military orders. If, in such parts of the country, men commit crimes defined by law, they must be punished according to the constitution and the law, in the civil courts. If, in such parts of the country, men have not perpetrated acts constituting, in law, crimes, their arrest, trial, and punishment, by military courts, is but a mode of applying lynch law; is, in short, mob violence. This is so unless the old English Tory doctrine of government is secretly included in our constitution. That doctrine, as expressed by Filmer, is that 'a man is bound to obey the King's command against the law; nay, in some cases, against divine laws.'" This is precisely the position afterwards taken by the majority in the Milligan case. So far as this case holds unconstitutional an act of Congress depriving a citizen of all redress for an illegal arrest, there can be no doubt of its correctness. Cooley, Const. Lim., 7th ed., 518, note; Johnson v. Jones, (1867) 44 Ill. 142, 92 Am. Dec. 159. In support of the doctrine that the arrest was illegal, see Ex parte McDonald, (1914) 49 Mont.

The kind of martial law sought to be enforced by the military commission in the *Milligan Case* corresponded to that which prevails in France under a declaration of a "state of siege," in which the constitutional guarantees are suspended, the military authority has the right to make searches, by day and night, in the domiciles of citizens; to remove persons accused and individuals who do not have their domicile in the places which are subject to the state of siege, to order the surrender of arms and munitions, and to interdict publication and meetings deemed of a nature to incite disorder.[18] "This kind of martial law," says Professor Dicey,[19] "is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion." This can mean nothing more, however, than that such things cannot be done without the authority of an act of Parliament; for the recent history of England has abundantly demonstrated that under proper parliamentary authority anything may be done.

During the Boer war it became necessary on account of the presence of a disaffected population, to proclaim martial law in Cape Colony in districts remote from actual hostilities. One Marais was arrested without a warrant under instructions from the military authorities, and detained without trial. He petitioned the supreme court of the Cape of Good Hope for release on the ground that his arrest and imprisonment were in violation of the fundamental liberties secured to subjects of His Majesty. The court refused his petition on the ground that martial law having been proclaimed in that district, the court ought not to go into the necessity for the proclamation. The Privy Council denied his petition for leave to appeal, laying down the rule that where actual war is raging, acts done by the military authorities are not justiciable by ordinary tribunals, and that the fact that for some purposes some tribunals have been permitted to pursue their ordinary course in the

454, 143 Pac. 947, L. R. A. 1915B 988; Francis v. Smith, (1911) 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A 1141. For elaborate note on Civil or Criminal Liability of Soldier or Militiaman for Injury to Person or Property see Ann. Cas. 1917C 8.

[18] Dicey, p. 272.

[19] Dicey, p. 273.

district in which martial law has been proclaimed is not conclusive that war is not raging.[20]

The extent to which the exigencies of the present war have driven the British government is shown by the fact that the courts are sanctioning the internment—that is, imprisonment—of civilian Germans long resident in England, declaring them prisoners of war, and refusing them the ancient privilege of the writ of habeas corpus. The difficulty of fixing any exact limit to the "actual theater of war" is shown in the opinion of the court in *Rex. v. Superintendent Vine Street Police Station.*[21]

"War at the present moment is not as it was in the olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the field of possible hostilities that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arm is taking place. In addition to this, methods of warfare, or methods ancillary to warfare, have come into practice on the part of our foes which involve the honeycombing of the realm with enemies, not only to obtain and despatch information, but to serve purposes directly helpful to the conduct of enterprises either actually warlike or eminently calculated to assist the prosecution of the war."

In that case the court made it very emphatic that they were dealing only with the case of alien enemies; but in January, 1916, they sustained an executive order of a very much more drastic character. A regulation had been issued under the Defense of the Realm Act, 1914, (authorizing the Council to issue regulations for securing the public safety), "that where on recommendation of competent naval or military authorities . . . it appears to the Secretary of State that . . . it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith . . . to be interned." This regulation was held not to be ultra vires.[22] In

[20] Ex parte Marais, [1902] A. C. 109, 85 L. T. 734.

[21] Rex. v. Superintendent Vine St. Police Station, (1915) 32 Times L. R. 3.

[22] Rex v. Halliday, (1916) 32 Times L. R. 245; affirmed, [1916] 1 K. B. 738, 114 L. T. 303, 32 T. L. R. 301.

the case cited, one Zadig, a naturalized British subject, was confined in an internment camp, and a rule nisi to the commandant to show cause why habeas corpus should not issue was refused. The Attorney General said: "The power to intern a British subject had been acted upon in a great number of cases, and a considerable number of persons who claimed British nationality had been interned and were detained at the present moment." Lord Chief Justice Reading said that under this act trials might be had by court-martial, "thus making persons subject, in certain circumstances, to martial law."[23]

In debate in the House of Commons March 2, 1916,[24] the Home Secretary, defending the exercise of quasi martial law under the conditions existing in the present war, stated that there were at the time sixty-nine persons under restraint who were technically British subjects but who were suspect because of hostile origin or associations. Some of them were persons against whom it would be difficult if not impossible to frame a legal indictment upon which they could be brought to trial. In other countries, he said, such cases were dealt with under martial law, but the British government considered that to establish martial law would be going beyond what was necessary. There had been no suspension of the habeas corpus act, and the particular Home Office regulation under the Defense of the Realm Act to which exception had been taken had been pronounced in accordance with the law by the seven justices of the High Court of Justice and three lords justices of the Court of Appeal.

There is a considerable difference between merely interning for the period of the war persons suspected of hostile intentions, and trying a civilian as for a crime and executing him by the authority of a military commission, as in the *Milligan Case*. But if the power exists to suspend the ordinary laws and the jurisdiction of the civil courts under the war power, it would seem to follow that military necessity might justify the infliction of punishment as well as mere detention.

It is said that the military commander may proclaim martial law "in time of war" within "the actual theater of war;" and time of war is said to mean, when the ordinary courts are not in the usual and open exercise of their functions. In the case

[23] Id.
[24] See New York Times, March 4, 1916.

of military government of occupied foreign territory, as has been seen, the military commander may think proper to permit the courts of the country to exercise their usual functions, but in so doing they act merely as licensees of the military authority. In like manner, after a proclamation of martial law, in territory where no actual fighting is going on, the commander-in-chief may permit the courts to exercise their usual functions within such limits as he may prescribe. In doing so the courts are the licensees of the military authority, but this does not authorize them to supervise the acts of the power to which they owe their existence. In the *Marais Case*[25] the Lord Chancellor said: "Where acts of war are in question the military tribunals alone are competent to deal with such questions." And again:[26]

"The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the military courts. Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. And it may even be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is a universal concensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities."

War having been declared to exist between the United States and Germany, must the military authority wait before proclaiming martial law until a hostile army has actually effected a landing on American soil, or may it do so in the vicinity of arsenals, munition factories, storehouses of munitions, flour mills, ship yards, wireless stations, bridges, railway lines, training camps, internment camps, centers of population in which there are evidences of disaffection? If the president proclaims martial law in a certain place, does the proclamation conclusively establish the existence of a state of war in that place, so as to protect an officer carrying into effect the sentence of a military commission? Sir Frederick Pollock[27] thinks that an Order in Council could neither add to nor derogate from the authority of a magistrate in the exercise of martial

[25] Note 20, supra.
[26] Ex parte Marais, [1902] A. C. 109 (115).
[27] 18 Law Q. Rev. 156; see also p. 158.

law. On the other hand, in a case arising in Colorado[28] where a person brought suit against the governor for causing his arrest and detention during a period of riot and disturbance, the Supreme Court of the United States said: "It is admitted, as it must be, that the governor's declaration that a state of insurrection existed is conclusive of that fact." It has been held in an unanimous opinion by the Supreme Court of the United States that when a question arises as to the existence of an exigency requiring the calling of the militia into the active service of the United States, the authority to so decide belongs exclusively to the President, and his decision is conclusive upon all other persons.[29]

It is true the privilege of the writ of habeas corpus cannot be suspended, "unless when, in cases of rebellion or invasion, the public safety may require it;"[30] but "invasion" is not limited to the actual landing of a hostile army. The danger of such invasion, it should seem, would justify the suspension of the writ. But the majority of the Supreme Court in the *Milligan Case*[31] said that martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." The Court was not speaking of the suspension of the writ of habeas corpus but of the exercise of martial law; but in either case, knowing what we do of the destructiveness of the submarine, of the almost incredible efficiency of the aeroplane in securing and of the wireless telegraph in transmitting intelligence, of the effectiveness of explosives, all these undreamed of by the judges of that period, it is hard to imagine any court at the present day declaring that the military authority must wait until a hostile army has actually landed on our coast before taking necessary steps to guard itself against the activities of secret enemies within our gates. It is equally absurd to suppose that a bench of judges would assume to pass upon a question of military necessity, the elements of which in the nature of things they can know next to nothing about.[32]

[28] Moyer v. Peabody, (1908) 212 U. S. 78, 29 S. C. R. 235, per Holmes J.

[29] Martin v. Mott, (1827) 12 Wheat. (U. S.) 19, 6 L. Ed. 537.

[30] Const. Art. 1, Sec. 9.

[31] (1866) 4 Wall. 2 (127), 18 L. Ed. 281.

[32] When the President, under the authority of Congress, calls forth the militia "to execute the laws of the union, suppress insurrections,

The war power is vested in Congress alone, or in Congress and the President. It is submitted that when the President, under the authority of Congress, during war, proclaims martial law in any part of the United States, no court will enter upon a judicial investigation of the necessity of so doing or question the validity of the act.

It must not be forgotten that the law military applies only to members of the military system, while martial law applies to civilians: yet Article 82 of the Articles of War[33] covers the case of spies, who are dealt with thus:

"Art. 82. Spies. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

Winthrop[34] says that "To be charged with the offense of spying it is not essential that the accused be a member of the army or a resident of the country of the enemy; he may be a citizen or even a soldier of the nation or people against whom he offends and at the time of his offense legally within their lines." If the statute quoted is constitutional, then any person accused of the specific offense of spying is not entitled to the guaranties of the constitution; and the reason must be that the particular offense is so peculiarly fatal to the successful exercise of the war power that it must be dealt with in a prompt and summary manner, unknown to the procedure of the civil courts. Incidentally, it is an interesting speculation why the Articles of War,[35] which in every other respect purport to be limited in their application to members of the mili-

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and repel invasions," his determination of the existence of the exigency is conclusive upon the courts. Martin v. Mott, (1827) 12 Wheat. (U. S.) 19. The authority of the President to call out the militia and establish martial law was before the Supreme Court in Luther v. Borden, (1848) 7 How. 1, 12 L. Ed. 581, Taney, C. J., significantly asked: "After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? . . . It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which the power would be more safe, and at the same time equally effectual."

[33] 4 U. S. Compiled Stat. Annotated, 1916, Sec. 2308a, p. 3983.

[34] Winthrop, II, 2nd ed., 1194.

[35] See note 33, supra.

tary establishment, should, in this particular instance, be extended to cover persons in no way connected with the army. But whatever be the explanation, the question immediately arises, if Congress may confer upon courts-martial or military commissions jurisdiction to try and hang spies, why not train wreckers, bomb planters, incendiaries, food poisoners, disease spreaders, inciters to desertion? If it be said that military necessity dictates the summary trial of spies in disregard of the constitutional guaranties, may not the same military necessity apply in the other cases mentioned? And if it may, in whom does the constitution lodge the responsibility of determining when that necessity arises—in those who wield the war power, or in the courts? Which is likely to be the better judge?

That precisely similar emergencies arose during the civil war is well illustrated by the following quotation from Winthrop:[36]

"In the leading cases of Beall and Kennedy, though the accused were charged and convicted inter alia as *spies,* their offenses were rather or mainly those of violators of the laws of war as prowlers (Lieber's Instructions, Sec. 84) or guerrilas; the crimes of Beall consisting mostly in seizing and destroying steamers and their cargoes on Lake Erie, and attempting to throw passenger trains off the track in the state of New York, in September and December, 1864; and the principal crime of Kennedy being his taking part in the attempt to burn the city of New York by setting fire to Barnum's museum and ten hotels on the night of November 25, 1864."

War-traitors,[37] if captured by the military authorities, are liable to be condemned to death in the exercise of martial law, or by the law military. The inference inevitably suggested is this: if the constitutional rights of the spy are not violated by his trial before a court-martial, it must be because the state

[36] Winthrop, II, 2nd ed., 1196-97. Sec. 84 of Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, and issued under the authority of the government during the civil war, is as follows: "Armed prowlers, by whatever names they may be called, or persons of the enemies' territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoners of war." Sec. 89: "If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death."

[37] See Lieber's Instructions, Secs. 90, 91, 92.

of war and the exercise of the war power has temporarily suspended those rights. Are the rights of the bomb planter, the train wrecker, the incendiary, the food poisoner, the disease spreader, the inciter to desertion, more sacred than those of the spy?

Those who adopt the view of the majority in the *Milligan Case* admit that in the "actual theater of war" martial law may be legally applied to civilians. But there is no more warrant in the constitution for the exercise of such authority within the theater of war than without. If the letter of the Bill of Rights be the test, a civilian, within the lines in Maryland during Lee's invasion, caught setting fire to military stores would have been entitled to jury trial. The fifth and sixth amendments entitle *all persons* to a jury trial except those in the military or naval service. The admission just mentioned is a recognition that the constitution was never meant to cover such a case. But is the exercise of martial law in such a case extra-constitutional and therefore illegal? It seems very plain that it is perfectly legal, because the state of war has suspended the fifth and sixth amendments, at least in "the actual theater of war." But the constitution uses no such phrase; it was invented by those who saw that in such a situation individualism must yield to the welfare of the state. And the phrase itself has no legal meaning; it involves a vast complex of technical military science, of secret information jealously guarded, of plans concerted by the government and its allies, of projects of possible invasion and of intrigue by the enemy which must be foreseen and thwarted. The folly of submitting such a question to the decision of a jury is too evident to need comment.

To the timid who, in order to justify martial law, require that it be exercised only in "the actual theater of war," it should be sufficient answer that that phrase embraces every place in which any military activities are going forward. If they insist that there must be actual invasion, it fairly may be said that every ship flying the United States flag is United States territory, and an attack on such a ship is as much an invasion of our territory as the bombardment of an American port.

As is indicated at the beginning of this article, the questions growing out of martial law are closely bound up with questions

involving other constitutional rights, e. g., the right not to be deprived of liberty or property without due process of law. This right is as much guaranteed by the constitution as the right to trial by jury. In the presence of war the two must stand or fall together. Can the citizen be compelled to sell his food products at a price to be fixed by law, or punished criminally for selling at a higher price? The determination of this question will test the scope of the war power as well as any other.

In the case of *Farey v. Burvett*,[38] the High Court of Australia determined that the Commonwealth of Australia does possess this power in time of war, although in time of peace the constitution reserves any such power to the states. The legislation in question was adopted to subserve the interests of the civil population, and its bearing upon the maintenance of armies and the conduct of the war was only indirect and incidental. The court in substance holds that the line of cleavage between state and federal power which obtains in time of peace is not binding when the very existence of the commonwealth is imperiled by war; that the power and duty of national defense is paramount; and that the system of checks and balances devised for a time of peace is temporarily suspended because the "organic power of defense" is supreme and commensurate with the peril, as Parliament sees the peril. This power, granted by the constitution itself, "is a power to command, control, organize and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defense is not confined to operations on the battle field or the deck of a man-of-war; its factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself . . ." And in the midst of a struggle of the gigantic proportions of the present world-contest, the question of necessity is declared to be one for the legislature and the executive and not for the court.

It was held by the majority in the *Milligan Case* that martial law is "confined to the locality of actual war," and that it "can never exist when the courts are open and in the proper

[38] (1916) 21 C. L. R. 433. For a discussion of this case, see 2 MINNESOTA LAW REVIEW 132.

and unobstructed exercise of their jurisdiction." A decision on so momentous a matter by a bare majority cannot be regarded as settling it. The opinion of the four dissenting judges, written by the Chief Justice, is that the fact that the courts are open is not conclusive since they "might be open and unobstructed in the execution of their functions and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty the guilty." Even in the most critical periods of war it may be possible to keep the courts open for the administration of ordinary justice; but when the military authority permits the court to sit in a district where martial law has been proclaimed, and the writ of habeas corpus is temporarily suspended, whatever functions the court may exercise are permissive only. If it should become necessary, in the opinion of Congress and the President, to place New York harbor under martial law, and suspend therein the writ of habeas corpus, it ought not to be necessary to close up the courts entirely in order to create a condition in which the military authority will not be interfered with by the courts. If in such an eventuality a civilian should be arrested while endeavoring to plant a bomb in the hold of an army transport, it is submitted that the question whether he shall be tried before a military commission or indicted by a federal grand jury is wholly a matter for Congress and the President to determine.

There are those who think that to suspend during a period of martial law certain individual liberties is equivalent to suspending the whole constitution and handing the country over to a military dictator. But this involves a fundamental misconception. No one would seriously claim that the military authority should be placed above the constitution. In providing for the suspension of the privilege of habeas corpus the constitution does not decree its own abolition; and when it provides for the temporary suspension of the individual rights which the habeas corpus was designed to protect until the ship of state emerges from the danger zone, the constitution merely shifts the responsibility for safeguarding the interests of the state and its citizens from one set of officers to another.[39]

[39] Moyer v. Peabody, (1908) 212 U. S. 78 (85), 29 S. C. R. 235, 53 L Ed. 410. The Court in this case says: "When it comes to a decision by the head of the State upon a matter involving its life, the

Every department of the government is as much subject to the constitution as before, but certain rights of the individual are for the time being subordinated to the safety of the state.[40]

If—as seems probable—the fate of democracy itself is involved in the present war, it is evident that the ability or inability of democracy to place all its resources at the disposal of its leaders will be the determining factor in the struggle. This is autocracy's supreme merit. If it be the true meaning of the constitution that the war power has been fettered by provisos which put the liberty of the citizen above the safety of the state, then either the experiment of self-government will prove a failure, or the chosen leaders of the people must when necessary disregard mere paper barriers. Unquestionably the war-leaders will use every weapon within reach, and it would be wiser to adopt that interpretation of the fundamental law which legalizes whatever imperative necessity compels, than to endeavor to put bounds to that which is essentially absolute and unlimited.

HENRY J. FLETCHER.

UNIVERSITY OF MINNESOTA.

ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." Per Holmes, J.

[40] For exhaustive discussions of the subject of this article, and supporting the opposite view, see Willoughby, Constitutional Law, II, Secs. 723-737; Lieber, "The Justification of Martial Law" 163 N. A. Rev. 549; Professor Ballentine, "Martial Law," 12 Col. L. Rev. 529.

The discussion in this article has been purposely limited to problems raised in a regularly declared war, as distinguished from the exercise of martial law by state authorities for the purpose of quelling riots and suppressing local disorder not amounting to civil war. The scope of the war power under the latter circumstances is probably greatly restricted by the exclusive constitutional grants to the federal government, and by the fact that such a disturbance can be "war" only in a very qualified sense. That the exercise of martial law in times of merely constructive war has been very greatly extended in recent years may be seen in the following cases: Moyer v. Peabody, supra; Hatfield v. Graham, (1914) 73 W. Va. 759, 81 S. E. 533, Ann. Cas. 1917C, 1; Mays v. Brown, (1912) 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996. As illustrating the utter paralysis of the military authority resulting from an application of the doctrine of the Milligan Case, to local disorders, see Franks v. Smith, (1911) 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A 1141.

In accord with the views of the author, see valuable article by Geerge S. Wallace, The Need, the Propriety, and Basis of Martial Law, Jour. Am. Inst. of Crim. L. & C. VIII, 167. 406.